United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,260

ANTWIN THEATRES, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,

WOMETCO ENTERPRISES, INC., *Intervenor*.

On Appeal From Order of the Federal Communications Commission

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STATEMENT OF QUESTIONS PRESENTED

The order of the Commission appealed from here by Antwin (Antwin Theatres, Inc.) granted renewal of the licenses of Station WTVJ, Miami, Florida, and Station WLOS-TV, Asheville, North Carolina, without affording Antwin an evidentiary hearing on its allegations of current and recent anti-competitive and monopolistic misconduct by Wometco (Wometco Enterprises, Inc., the Intervenor here), licensee of WTVJ, Miami, and controlling parent of the licensee of WLOS-TV, Asheville. There is a pending suit under the anti-trust laws brought by Antwin against various defendants in the Southern District of New York. Wometco is named as a defendant to that anti-trust suit, but is not a party because it is not subject to service in that District and has not volunteered to appear. The Commission granted the renewals but made them conditional upon the outcome of the pending suit because the Commission found that "the matters raised" in the pending anti-trust suit "are essentially the same as" the allegations of Wometco misconduct on which the Commission refused hearing in this proceeding. In this context, the questions presented are:

1. Whether the Commission's order is invalid because the Commission made no finding that the grants of renewal of licenses for WTVJ and WLOS-TV would serve the public interest, convenience and necessity.

2. Whether the Commission's order is invalid because it granted such renewals without determining the questions as to the character qualifications of the licensees raised by Antwin's allegations of Wometco's misconduct.

3. Whether the Commission's order was invalid because it denied hearing on Antwin's allegations of Wometco misconduct on the sole basis of Antwin's pending anti-trust suit in which Wometco is immune from service and has not volunteered to appear.

INDEX

TABLE OF AUTHORITIES

Cases

Page

Page

ADMINISTRATIVE DECISIONS

STATUTES AND RULES

OTHER AUTHORITIES

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is taken pursuant to Section 402(b)(2)(6) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 402(b)(2)(6)), Section 10 of the Administrative Procedure Act (5 U.S.C. Sec. 1009), and Rule 37 of the Rules of this Court.

STATEMENT OF THE CASE

Antwin (Antwin Theatres, Inc., the Appellant) petitioned the Commission to hold hearing upon and deny the then pending applications for renewal of the licenses for WTVJ, Miami, Florida, and WLOS-TV, Asheville, North Carolina (R. 296-297). We summarize the allegations of Antwin's petition.

Antwin leases and operates the Golden Glades Drive-In Theatre, a first-class modern theatre in Greater Miami, Florida, suitable for the showing of first run films. The Golden Glades Drive-In Theatre competes for audience with television station WTVJ in Miami, Florida. R. 280.

Wometco (Wometco Enterprises, Inc., the Intervenor) is the licensee of television station WTVJ, Miami, and controls the licensees of WLOS-TV, Asheville, North Carolina, and KVOS-TV, Bellingham, Washington. In addition, Wometco operates a chain of theatres in Florida, including twenty-two theatres located in Greater Miami. R. 281.

American Broadcasting-Paramount Theatres, Inc. (hereinafter ABC) owns and operates a television network with about three hundred affiliated stations, and is itself the licensee of five television stations: WABC-TV, New York; WBKB, Chicago, Illinois; WXYZ-TV, Detroit, Michigan; KGO-TV, San Francisco, California; and KABC-TV, Los Angeles, California. In addition, ABC, through wholly-owned subsidiaries, operates 472 motion picture theatres in the South and West. Fifty of these theatres in Florida with nine located in Greater Miami are operated by ABC's wholly-owned subsidiary, Florida States Theatres, Inc. (hereinafter Florida States). R. 281-282.

Antwin, if it is to survive, must rent first run films from the same distributors who rent films to Wometco and ABC (Florida States) for showing by their television stations, television network, and theatres (R. 281-282).

From a time prior to June, 1955, and continuing to date, Wometco and Florida States, individually and in combination with each other, have built up and maintained a monopoly of the exhibition of first run films in the Greater Miami area by use of economic power and dominant position to prevent the entry or successful operation of any independent competitor (R. 280, 284). Wometco or Florida States, as arranged between them, buys out any independent competitor, or, failing that, opens a theatre close to the independent competitor so as to drive him out of business by ruinous competition aided by their monopoly over the exhibition of first run films (R. 284).

In specific relation to the operations of the Wometco-Florida States combination against Antwin as a new, independent competitor, Wometco sought to buy Antwin's new Golden Glades Drive-In Theatre while it was still under construction in 1955 (R. 284). Failing in that, Wometco and Florida States induced the six distributors[1] who distribute most of the first run films for the Greater Miami area to deny Antwin an opportunity to rent first run films on the basis of Antwin's ability to offer the terms and pay the amounts required by such distributors (R. 282, 285-286). Such inducement was effected by: (1) express threats by Wometco and Florida States to show no films in their theatre chains which had been shown first run in Antwin's Golden Glades; and (2) the further threat that any distributor serving Golden Glades with first run pictures would lose the valuable business of renting old pictures (of little value for other uses) to the television stations controlled by Wometco and ABC (Florida States' parent company). R. 285-286. So pressured by Wometco and Florida States, the exhibitors served and still serve Antwin with second

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[1] The distributors are: Metro-Goldwyn-Mayer, Inc., Universal Film Exchanges, Inc., United Artists Corporation, Embassy Pictures Corporation, Warner Bros. Pictures Distributing Corporation, and Buena Vista Distribution Co., Inc. (R. 282).

run films on a fixed and unreasonable clearance of 28 days in favor of Wometco and Florida States theatres (R. 286). And shortly after Antwin opened its Golden Glades, Wometco opened its North Dade Drive-In Theatre, located within two miles of Golden Glades. Wometco had obtained the North Dade Drive-In from a proposed independent exhibitor when the Golden Glades was still under construction. The North Dade Drive-In is not suitable for first run pictures, but Wometco kept it open at a loss in order to provide ruinous competition to the Golden Glades on second run pictures. In 1959, with Golden Glades in its third year of losses resulting from the Wometco-Florida States monopoly of first run film exhibition, Wometco unsuccessfully sought to have Antwin pool its Golden Glades operation with Wometco's North Dade Drive-In. R. 287.

In 1960, Wometco opened its 163rd Street Theatre, a conventional theatre (not drive-in) about 5.6 miles from the Golden Glades. All distributors immediately served the 163rd Street Theatre with first run pictures. Antwin reiterated its demands on the distributors for first run pictures, and urged that Golden Glades be afforded the opportunity to play first run pictures "day and date"[2] with Wometco's 163rd Street Theatre, since a drive-in and a conventional theatre appeal to different types of attendance (R. 287-288). Through understandings with the distributors, Wometco and Florida States do not permit "day and date" showing by a drive-in theatre in the Greater Miami area of a picture shown in their favored theatres. Nor do they permit the showing in any of their theatres in the Greater Miami area of a first run picture shown anywhere in that area by an outside theatre (R. 290-291). However, the distributors purported to accede to Antwin's demands for first run pictures so far as to institute a

[2] Playing first run pictures "day and date" means permitting one theatre in a zone to exhibit the same picture contemporaneously with another theatre which is generally in a different zone regarded by the distributors to be non-competitive.

system of bidding in which Antwin is ostensibly permitted to bid for first run pictures against other theatres in the zone to which Golden Glades was and continues to be assigned (R. 288, 293).

The bidding system, designed to lend an appearance of competitive bidding, is fraudulently and deceptively manipulated by the distributors in conjunction with Wometco and Florida States so as to maintain the Wometco and Florida States control of first run pictures. Among the fraudulent and deceptive practices in use for that purpose are: (1) the arbitrary inclusion in Antwin's bidding zone of two Florida States theatres, non-competitive with Antwin and located in other communities ten miles from Golden Glades; (2) Wometco and Florida States, pursuant to the understanding between them, do not bid against each other; (3) availability dates are specified for times when Golden Glades is known to have contracted for other pictures; (4) if, by a change in operations, Antwin is enabled to bid and is the high bidder, the specified availability date is changed to another date when Golden Glades is known to be occupied, or Antwin's bid is rejected on a fanciful excuse, or no excuse at all; (5) availability dates are specified to fit the needs of the Wometco and Florida States theatres; (6) when necessary, Wometco or Florida States bids for a picture against Antwin at a price so high as to bear no reasonable relation to expected receipts from showing of the picture; (7) when highly desirable pictures are made the subject of negotiations and not let out to bid, all of the distributors decline to negotiate with Antwin for any first run picture wanted by Wometco or Florida States; and (8) Antwin is discriminated against by discounts, allowances, rebates, and other preferential arrangements and accommodations afforded by distributors to Wometco and Florida States. R. 288-290.

So much suffices in summary of Antwin's allegations of the Wometco-Florida States monopoly of the exhibition of

first run film in the Greater Miami area successfully built up and maintained for over twelve years by the use of threats, and fraudulent, anticompetitive, and deceptive practices in which Wometco continues to participate.

Faced with those Antwin allegations of Wometco misconduct and Wometco's denial (R. 787, 791) of any wrongdoing, the Commission granted renewal of the Wometco licenses for the stations WTVJ, Miami, Florida, and WLOS-TV, Asheville, North Carolina, without hearing on Antwin's allegations of misconduct and Wometco's denial of them (R. 310). The Commission made no finding that the public interest would be served by renewal of the Wometco licenses (R. 308-310). Instead, the Commission taking note of a private anti-trust suit filed in July, 1966, by Antwin which included Wometco amongst a number of defendants named therein, stated that the matters in the anti-trust suit are, in the Commission's opinion, "essentially the same" as those here, and thought it "appropriate" to await the outcome of the July, 1966, anti-trust suit before determining "what action concerning the licenses, if any, is required by the circumstances" (R. 309). Accordingly, the Commission conditioned its grant of the Wometco licenses upon the outcome of the anti-trust suit and immediate notification to the Commission of the final disposition of that case (R. 310, 303, 823). This appeal by Antwin followed.

In the Antwin anti-trust suit (*Antwin Theatres, Inc.* v. *United Artists Corporation, et al.*, S.D.N.Y. Civil Action No. 66-2020, filed July, 1966), Wometco was named as a defendant, but it is not a party because it cannot be served with process in New York where it does no business, and it has not volunteered to appear. Trial of the case between the parties thereto has yet to start. R. 787, 755, 761-772.

STATUTES INVOLVED

The statutes involved are Sections 307(d), 309(a), 309(d), and 309(e) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 307(d), and 309(a)(d)(e)).

STATEMENT OF POINTS

The Commission committed reversible error and acted arbitrarily in granting renewal of the licenses of WTVJ and WLOS-TV in that:

1. The Commission made no finding that such renewal would serve the public interest, convenience and necessity.

2. The Commission granted such renewals without determining the questions as to the character qualifications of the licensees raised by Antwin's allegations of Wometco's misconduct.

3. The Commission denied hearing on Antwin's allegations of Wometco's misconduct solely on the basis of Antwin's pending anti-trust suit in which Wometco is immune from service and has not volunteered to appear.

SUMMARY OF ARGUMENT

I. The statute, the Commission's regulations, and the Court's decisions all plainly prohibit the Commission from renewing a broadcast license without a finding by the Commission that renewal will serve the public interest. The Wometco renewals were made without any such finding and are invalid for that reason.

II. The Wometco monopolistic misconduct alleged by Antwin is serious, long-continued, and still going on. It is the type of misconduct which, as the decisions of this Court and of the Commission show, relates importantly to the character qualifications of a licensee, and must be considered and determined in finding the public interest or lack of it in license renewal. Here, the Commission, while

recognizing that the Wometco misconduct must be so considered and determined, invalidly granted the Wometco renewals and postponed its consideration and determination to some future date.

III. The question of Wometco's alleged misconduct must be determined upon evidentiary hearing since there are substantial and material issues of fact, and the misconduct, if established, would be a reason why renewal of the Wometco licenses might not serve the public interest. The Commission's renewal of the Wometco licenses without hearing was, therefore, invalid. *Philco Corp.* v. *Federal Communications Commission,* 110 App. D.C. 387, 293 F. 2d 864, and other decisions of this Court and the Commission, as cited in the Argument. *Philco* controls this case.

ARGUMENT

I. The Commission's Renewal of the Licenses for WTVJ and WLOS-TV Is Invalid Because the Commission Made No Finding That Such Renewal Would Serve the Public Interest, Convenience and Necessity

By reason of the specific provisions of the Communications Act of 1934, as amended, the Commission cannot grant renewal of a broadcast license without finding that renewal would serve the public interest, convenience and necessity. Section 307(d) authorizes renewal "if the Commission finds that public interest, convenience, and necessity would be served thereby." Section 309(a) directs the Commission to "determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application," and to grant the application "if the Commission . . . shall find that public interest, convenience, and necessity would be served by the granting thereof." Section 308 explicitly applies to renewals of station licenses. And with specific reference to a petition to deny, the Act (Section 309(d)(2)) requires

the Commission to grant an application (including a renewal application) if it finds that there are no material and substantial questions of fact and that the grant would be consistent with Section 309(a); and, otherwise (Section 309(e)) if the Commission finds a substantial and material question of fact, or is unable for any reason to make the finding of serving the public interest, convenience, and necessity specified in Section 309(a), the Commission is required to designate the application for hearing. See 47 U.S.C. Secs. 307(d), 308, and 309(a)(d)(e).

Reflecting the clear provisions of the Communications Act which we have just set forth, the Commission's own regulations require that the Commission find that a grant of renewal would serve the public interest, convenience, and necessity (Section 1.591(a)(4), 47 C.F.R. Sec. 1.591 (a)(4)), or, absent such finding, that the Commission must designate the application for hearing (Section 1.593, 47 C.F.R. Sec. 1.593). And this Court's decisions have uniformly recognized the statutory requirement of no grant of license renewals, and like authorizations, without the Commission's finding that the public interest, convenience, and necessity would be served thereby. See *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 123 App. D.C. 328, 341, 359 F. 2d 994, 1007; *Hudson Valley Broadcasting Corporation* v. *Federal Communications Commission,* 116 App. D.C. 1, 5, 320 F. 2d 723, 727; *Clarksburg Pub. Co.* v. *Federal Communications Commission,* 96 App. D.C. 211, 222, 225 F. 2d 511, 522, 12 R.R. 2024, 2038; cf. *Carroll Broadcasting Co.* v. *Federal Communications Commission,* 103 App. D.C. 346, 350, 258 F. 2d 440, 444, 17 R.R. 2066, 2068.

Here the Commission in violation of the plain requirement of the statute, its own regulations, and this Court's decisions renewed the licenses of WTVJ and WLOS-TV without any finding that the public interest, convenience, and necessity would be served thereby. There is no such

finding in the Commission's decision (R. 308-310). The omission of such finding was not a technical failure to record a finding actually made. That is clear because: (1) there are no subsidiary findings which would be essential for an ultimate finding of the public interest;[3] (2) the Commission expressly postponed to the future its determination of what Antwin's allegations of Wometco misconduct may require in the public interest (R. 309; and see Point II, *infra*); and (3) in any event, the Commission could not, without hearing thereon, find that the public interest would be served by the renewals it granted (Point III, *infra*).

The Commission's order which granted renewal of licenses for WTVJ and WLOS-TV without any finding that the public interest would be served thereby must be reversed as contravening the controlling statute, the controlling regulations, and the controlling decisions of this Court.

II. The Commission's Renewal of the Licenses for WTVJ and WLOS-TV Is Invalid Because the Commission Did Not Determine the Questions as to the Character Qualifications of the Licensees Raised by Antwin's Allegations of Wometco's Misconduct

"In considering an application for a renewal of license, an important consideration is the past conduct of an applicant, for 'by their fruits ye shall know them.' Matt. VII: 20." So this Court ruled many years ago at the very beginning of its review of agency decisions in the field of federal communications. See *KFKB Broadcasting Ass'n.* v. *Federal Radio Commission,* 60 App. D.C. 79, 81, 47

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[3] *Plains Radio Broadcasting Co.* v. *Federal Communications Commission,* 85 App. D.C. 48, 175 F. 2d 359, 4 R.R. 2157; *American Broadcasting Co.* v. *Federal Communications Commission,* 85 App. D.C. 343, 179 F. 2d 437, 5 R.R. 2041; *Community Broadcasting Co.* v. *Federal Communications Commission,* 107 App. D.C. 95, 274 F. 2d 753, 19 R.R. 2047.

F. 2d 670, 672. Since that time, this Court [4] and the Commission,[5] too, have repeatedly recognized that anti-competitive or monopolistic past conduct of an applicant for license authorization may disqualify him.

Wometco has been continuously engaged in the anti-competitive and monopolistic misconduct, charged here, for over a decade, and is still engaged in it (see p. 3, *supra*). The misconduct is serious. Wometco's seeking and maintaining of a monopoly of the exhibition of first run pictures in the Greater Miami area appears to violate Section 2 of the Sherman Anti-Trust Act, as carried on individually by Wometco,[6] and both Sections 1 and 2 of that Act as carried on by Wometco in combination with Florida States.[7] All of the many practices engaged in by Wometco to achieve and maintain its monopoly (R. 283-294) apparently violate the Sherman Anti-Trust Act: (1) the use and

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[4] *Federal Broadcasting Sys., Inc.* v. *Federal Communications Commission*, 96 App. D.C. 260, 225 F. 2d 560, cert. den. 350 U.S. 923; *Philco Corporation* v. *Federal Communications Commission*, 110 App. D.C. 387, 293 F. 2d 864, 21 R.R. 2079; *Federal Broadcasting Sys.* v. *Federal Communications Commission*, 97 App. D.C. 293, 231 F. 2d 246; *Mansfield Journal Co.* v. *Federal Communications Commission*, 86 App. D.C. 102, 180 F. 2d 28, 5 R.R. 2074e; see *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 223; *Metropolitan Television Company* v. *Federal Communications Commission*, 110 App. D.C. 133, 135, 289 F. 2d 874, 876.

[5] *Report on Uniform Policy as to Violations by Applicants of Laws of the United States*, 1 R.R. Part 3, 91:495, 499-500; *Westinghouse Broadcasting Co., Inc.*, 22 R.R. 1023; *General Electric Co.*, 2 R.R. (2) 1038; *Syracuse Television, Inc.*, 5 R.R. (2) 577.

[6] See 15 U.S.C. Sec. 1; the allegations as to the substantial interstate commerce involved (R. 294); *Lorain Journal* v. *United States*, 342 U.S. 143; and *Packaged Programs* v. *Westinghouse Broadcasting Co.*, 255 F. 2d 708 (C.A. 3).

[7] See 15 U.S.C. Secs. 1 and 2, and the following cases: *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207; *United States* v. *Griffith*, 334 U.S. 100; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173; *William Goldman Theatres* v. *Loew's, Inc.*, 150 F. 2d 738 (C.A. 3), cert. den. 334 U.S. 811; *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F. 2d 600 (C.A. 8); *United States* v. *Schine Chain Theatres*, 63 F. Supp. 229 (W.D.N.Y.), appeal dismissed, 329 U.S. 686.

threatened use of Wometco buying power;[8] (2) the acquisition of additional theatres;[9] (3) the attempts to buy out new competitors; (4) the opening of new theatres close to new competitors; (5) the attempt to buy out Antwin's Golden Glades Theatre; (6) the opening of the North Dade Drive-In Theatre; (7) the attempt to pool the Golden and North Dade Drive-In operations; (8) the opening of the 163rd Street Theatre;[10] (9) the fixing of first runs and first run clearances;[11] (10) the unreasonable clearances;[12] and (11) the deceptive and fraudulent bidding practices.[13]

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[8] *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 209 ff.; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 181; *United States* v. *Schine Chain Theatres*, 63 F. Supp. 229, 235 (W.D.N.Y.), appeal dismissed, 329 U.S. 686; *Homewood Theatre* v. *Loew's, Inc.*, 110 F. Supp. 398, 407 (D.C. Minn.), appeal dismissed, 207 F. 2d 263.

[9] See *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809.

[10] On the Wometco illegal practices numbered (3) through (8) in the text see *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 179; *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F. 2d 600, 602-603 (C.A. 8); *United States* v. *Schine Chain Theatres*, 63 F. Supp. 229, 235 (W.D.N.Y.), appeal dismissed, 329 U.S. 686; *Gittone* v. *Warner Bros. Pictures*, 30 F. Supp. 823, 824 (E.D. Pa.), rev'd on other grounds, 110 F. 2d 292.

[11] *United States* v. *Paramount Pictures*, 66 F. Supp. 323, 342 (S.D.N.Y.), aff'd. 334 U.S. 131; *Bigelow* v. *R.K.O. Radio Pictures*, 78 F. Supp. 250, 255 (N.D. Ill.), aff'd. 170 F. 2d 783; *Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 176 F. Supp. 527 (D.C. Minn.), aff'd. 289 F. 2d 418; *Homewood Theatre* v. *Loew's, Inc.*, 110 F. Supp. 398 (D.C. Minn.); *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. 2d 538 (D.C. Nebr.); see *Kressley* v. *United Artists Corp.*, 119 F. Supp. 665, 671-672 (E.D. Ill.); *Loew's, Inc.* v. *Somerville Drive-In Theatre Corp.*, 54 N.J.S. 224, 148 Atl. (2) 599, 605 (N.J. Super.); *cf. Interstate Circuit* v. *United States*, 306 U.S. 208.

[12] *United States* v. *Paramount Pictures*, 334 U.S. 131; *Bigelow* v. *RKO Radio Pictures*, 150 F. 2d 877 (C.A. 7), rev'd on other grounds 327 U.S. 251; *Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 176 F. Supp. 527, 532 (D.C. Minn.), aff'd. 289 F. 2d 418; *Bigelow* v. *RKO Radio Pictures*, 78 F. Supp. 250, 255 (N.D. Ill.), aff'd. 170 F. 2d 783; *Homewood Theatre* v. *Loew's, Inc.*, 110 F. Supp. 398, 408 (D.C. Minn.), appeal dismissed 207 F. 2d 263; *Maple Drive-In Theatre Corp.* v. *Radio-Keith-Orph. Corp.*, 153 F. Supp. 240 (S.D.N.Y.).

[13] *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (condemns the use of buying power to combine competitive and non-competitive situations in renting motion pictures); *Milgram* v. *Loew's, Inc.*, 192 F. 2d 579 (C.A. 3), cert. den. 343 U.S. 929 (condemns the rejection of high bids); see *Bigelow* v. *RKO Radio Pictures*, 78 F. Supp. 250, 255 (N.D. Ill.), aff'd. 170 F. 2d 783 (condemns clearance zones that include non-competitive theatres).

The questions as to character qualifications raised by allegations of such long-continued and current Wometco misconduct must be considered by the Commission and determined even though the anti-trust violations involved have not been judicially declared,[14] and even if for some reason there were no such violations.[15] The very purpose of the statutory provisions governing the Commission's proceedings on Antwin's Petition to Deny is, as held by this Court, "to search out the public interest." *Hall* v. *Federal Communications Commission,* 99 App. D.C. 86, 90, 237 F. 2d 567, 571. That search "would be grossly inadequate" if it ignored the Wometco misconduct charged by Antwin. See *Mester* v. *United States,* 70 F. Supp. 118, 122 (E.D. N.Y.), aff'd *per curiam* 332 U.S. 749.

The Commission in its decision now under review does not deny that the questions raised by Antwin's allegations of Wometco's misconduct must be considered and determined by the Commission as they may affect the public interest. On the contrary, the Commission gives recognition to that obligation by its conditioning of the grant of licenses for WTVJ and WLOS-TV on the outcome of Antwin's civil anti-trust suit (R. 310), and by its prediction that upon notification of such outcome it "will determine what action concerning the licenses, if any, is required by the circumstances" (R. 309). However convenient that

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[14] *Philco Corporation* v. *Federal Communications Commission,* 110 App. D.C. 387, 293 F. 2d 864; *Mansfield Journal Co.* v. *Federal Communications Commission,* 86 App. D.C. 102, 180 F. 2d 28; *Syracuse Television, Inc.,* 5 R.R. (2) 577 (F.C.C.); *Connecticut Water Co.,* 17 R.R. 960, 971 (F.C.C.); *Report on Uniform Policy as to Violation by Applicants of Laws of the United States,* 1 R.R. Part 3, 91:495, 499; *Rockland Broadcasting Co.,* 24 R.R. 739 (Review Board); *Community Radio of Saratoga Springs, New York, Inc.,* 3 R.R. (2) 644 (Review Board); *Syracuse Television, Inc.,* 8 R.R. (2) 939 (Review Board); see *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 223.

[15] *Philco Corporation* v. *Federal Communications Commission,* 110 App. D.C. 387, 391, 293 F. 2d 864, 868, 21 R.R. 2079, 2083; *Metropolitan Television Company* v. *Federal Communications Commission,* 110 App. D.C. 133, 135, 289 F. 2d 874, 876; *Federal Broadcasting Sys.* v. *Federal Communications Commission,* 97 App. D.C. 293, 297, 231 F. 2d 246, 250; *Mansfield Journal Co.* v. *Federal Communications Commission,* 86 App. D.C. 102, 180 F. 2d 28.

might be for the Commission in this case at this time,[16] the fatal vice of such postponement is that the Commission cannot validly grant license renewals without a finding on the public interest (Point I, *supra*), and it could not make such finding without consideration and determination of the question as to character qualifications raised by Antwin's allegations of Wometco's misconduct.

III. The Commission's Renewal of the Licenses for WTVJ and WLOS-TV Is Invalid Because the Commission Denied Antwin an Evidentiary Hearing on Its Allegations of Wometco Misconduct

We have shown: (1) in Point I that the Commission could not validly renew the licenses for WTVJ and WLOS-TV without a finding that the public interest would be served thereby (the Commission made no such finding); and (2) in Point II that no such finding could be made without considering and determining the questions raised by Antwin's allegations of Wometco misconduct (the Commission made no such determination). In this Point III we show that the questions raised by Antwin's allegations of Wometco misconduct must be determined upon evidentiary hearing (the Commission denied such hearing).

Antwin's Petition to Deny is surely "an articulated statement of some fact or situation which would tend to show, if established, that the grant of the license contravened public interest, convenience and necessity." See *Philco Corporation* v. *Federal Communications Commis-*

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[16] Consideration and determination now of the questions raised by Antwin's allegations of Wometco misconduct would in this case have required a hearing (not otherwise necessary) on those questions (See Point III, *infra*). After the Commission's decision in this case, the Commission's Review Board recognized that in a comparative hearing, already set, evidence on Antwin's allegations of Wometco's misconduct would have to be received and considered as it affected determination of which of several competing applicants, including a Wometco subsidiary, would best serve the public interest. See F.C.C. Review Board Memorandum Opinion and Order, adopted November 20, 1967, *In re Applications of Florida-Georgia Television Company, Inc., et al*, Docket No. 10834, p. 5.

sion, 110 App. D.C. 387, 390, 293 F. 2d 864, 867, 21 R.R. 2079, 2082; *Federal Broadcasting Sys., Inc.* v. *Federal Communications Commission,* 96 App. D.C. 260, 263, 225 F. 2d 560, 563, cert. den. 350 U.S. 923. "The fact or situtation" here is Wometco's alleged persistence in over ten years of anti-competitive practices, and it more than "tends to show" that the grant of the Wometco renewals "contravened the public interest, convenience and necessity" (see Point II, *supra*).

In these circumstances, the Commission is compelled by statute to grant evidentiary hearing on Antwin's Petition to Deny if a "substantial and material question of fact is presented," or if there is any reason why the Wometco license renewals might not serve the public interest, convenience and necessity. Communications Act of 1934, as amended, Section 309(e), 47 U.S.C. Sec. 309(e); *Hudson Valley Broadcasting Corporation* v. *Federal Communications Commission,* 116 App. D.C. 1, 5, 320 F. 2d 723, 727; *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 123 App. D.C. 328, 341, 359 F. 2d 944, 1007; *Federal Broadcasting Sys.* v. *Federal Communications Commission,* 97 App. D.C. 293, 297, 231 F. 2d 246, 250; *Wometco Enterprises, Inc.* v. *Federal Communications Commission,* 114 App. D.C. 261, 314 F. 2d 266. This is well-settled (See *Hecksher* v. *Federal Communications Commission,* 102 App. D.C. 350, 351, 253 F. 2d 872, 873); and at least in the past, the Commission has recognized and observed the command of the statute. *Syracuse Television, Inc.,* 5 R.R. (2) 577; *J. B. Wathen, III,* 15 R.R. 837; *Coos County Broadcasters,* 13 R.R. 626; *Syracuse Television, Inc.,* 8 R.R. (2) 939 (Review Board); *Community Radio of Saratoga Springs, New York, Inc.,* 3 R.R. (2) 644 (Review Board); *Rockland Broadcasting Co.,* 24 R.R. 739 (Review Board).

Here, both of the statutory reasons for requiring a hearing are present: (1) Antwin's allegations of Wometco

misconduct present a very substantial reason why the renewal of the Wometco license might not serve the public interest; and (2) substantial and material issues of fact are presented, for such Wometco misconduct is denied.

Yet the Commission denied Antwin a hearing. It did so solely to await the outcome of a civil anti-trust suit brought in New York by Antwin. R. 309. The suit involves many but not all of the matters alleged in Antwin's Petition to Deny (Contrast R. 283-294 to R. 761-769). Neither Wometco, nor any of its subsidiaries is a party to the suit. Wometco was named as a defendant, but it is not a party because it cannot be served with process in New York where it does no business, and it has not volunteered to appear. Filed in July, 1966, the suit has yet to come to trial.

Even if it were assumed, contrary to the fact, that the New York suit involves essentially the same matters as Antwin's Petition to Deny, and further that Wometco is a party to the suit, and still further that the suit is near its termination, the pendency of the suit provides no basis for the refusal of the Commission to hold a hearing on the Petition to Deny so that the public interest may be determined. What the Commission has to determine by hearing on Antwin's Petition to Deny is not Antwin's private rights under the anti-trust laws, or Wometco's violations of those laws. Rather, it must determine, regardless of Antwin's private rights and whether or not there are violations of anti-trust laws, the public interest or lack of the public interest in renewal of the Wometco licenses. *Philco Corporation* v. *Federal Communications Commission,* 110 App. D.C. 387, 391, 293 F. 2d 864, 868, 21 R.R. 2079, 2083; *Federal Broadcasting Sys.* v. *Federal Communications Commission,* 97 App. D.C. 293, 297, 231 F. 2d 246, 250; *Mansfield Journal Co.* v. *Federal Communications Commission,* 86 App. D.C. 102, 106, 180 F. 2d 28, 32, 5 R.R. 2074e, 2078. For this reason, the

pendency of a law suit covering the same matters as are alleged to the Commission is no excuse for abdication of the Commission's exclusive duty of determining by hearing whether alleged serious misconduct is true, and, if so, whether the grant of license renewal would contravene the public interest. *Philco Corporation* v. *Federal Communications Commission, supra; Syracuse Television, Inc.,* 5 R.R. (2) 577; *Syracuse Television, Inc., et al.,* 8 R.R. (2) 939 (Review Board); *Community Radio of Saratoga Springs, New York, Inc.,* 3 R.R. (2) 644 (Review Board); *Rockland Broadcasting Co.,* 24 R.R. 739 (Review Board).

As this Court succinctly ruled in *Philco* (110 App. D.C. 387, 391, 293 F. 2d 864, 868), "determination of the public interest cannot be postponed pending the outcome of law suits." *Philco* controls this case. There, as here, the Commission granted renewal of a license without hearing on allegations of monopolistic practices by the licensee's parent company; there, as here, the monopolistic practices were alleged to be aided by the broadcast license; there, as here, pending anti-trust litigation involved the monopolistic practices; and there, as here, the Commission in denying hearing conditioned its grant of renewal so as to leave itself formally free (it would be free anyway) to take such action as it might deem "appropriate" upon termination of the anti-trust litigation (R. 309; and *Philco* at p. 391 of the App. D.C. citation and 868 of the F. 2d citation). Enforcing the command of Section 309(e) of the statute, *Philco* reversed the Commission there for failure to hold an evidentiary hearing. *Philco,* undistinguishable on its facts and applicable statute and law, requires reversal here for the same reason.

Indeed *Philco* applies here *a fortiori.* As *Philco* holds, the pendency of relevant litigation supplies no legitimate excuse for failure to hold evidentiary hearing for determination of the public interest. But here the Commission's refusal to hold such evidentiary hearing because of the

pendency of the civil anti-trust suit makes no sense at all. That suit will settle nothing binding on Wometco, since it is not a party, is unwilling to become one, and cannot be compelled to become one.

CONCLUSION

For all of the foregoing reasons, the Commission's order of August 1, 1967, should be reversed and the case remanded with directions that a hearing be promptly held on the allegations made by appellant in its Petition to Deny.

Respectfully submitted,

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